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No. 84-223

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1984

TRIPLE "A" MACHINE SHOP, INC.,
Petitioner,

VS.

SOUTHWEST MARINE, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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November 21, 1984



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PETITIONER'S CONDUCT BEFORE THE SAN DIEGO PORT DISTRICT, WHICH RESPONDENT CLAIMS TO BE AT ISSUE, IS ANTITRUST-IMMUNE UNDER THE NOERR-PENNINGTON DOCTRINE

Triple "A" Machine Shop's petition for certiorari seeks review of the Ninth Circuit's decision that respondent cannot be barred from recovery by reason of the *pari delicto* of its alter ego, Arthur Engel, in negotiating and executing the contract (the Users' Agreement) which denied respondent access to the drydock owned by the United States Navy and leased by the San Diego Port District. In its opposition

brief, respondent seeks to eclipse that issue from this Court's inquiry. Respondent argues that negotiating and executing the Users' Agreement may not be considered in applying the defense of *in pari delicto*. This, respondent contends, is because that is not what constitutes the antitrust violation alleged here.¹ Consequently, respondent argues, "subsequent acts of implementation and encouragement must be evaluated" to determine if the antitrust plaintiff is *in pari delicto*. From this respondent concludes that it is not *in pari delicto* because it did not participate in that conduct (Brief in Opposition, pp. 7-8).

The Court may assume that subsequent efforts by defendants to advocate enforcement of the Users' Agreement constitutes the conduct to be considered on this petition. But this only confirms that certiorari should be granted here for still another reason: When the conduct in question is that of petitioning a governmental agency to enforce a valid contract (respondent having acknowledged the contract itself to be lawful), that petitioning conduct is plainly not proscribed by the antitrust laws according to this Court's decisions in *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)

¹Respondents contended below that initiation and execution of the Users' Agreement, by itself, "would not violate the antitrust laws" (CR 244); rather, "[i]t was that decision [to oppose a waiver of paragraph 31(b) and (c) for respondent only] by defendants which breathed economic life in sections 32(b) and (c) and it is that decision from which all damages to it resulted" (CR 272). Repeatedly, respondent contended that adoption of paragraph 32(b) and (c) was an "economically benign act" and "no economical effect was produced until the sections were enforced." (CR 249).

and their progeny. Under the *Noerr-Pennington* doctrine, *bona fide* efforts to obtain or influence legislative, executive, judicial or administrative actions are immune from anti-trust liability. As this Court declared in *Noerr*, 365 U.S. at 185, "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." Nor does it matter that petitioner's intent in seeking governmental action is to restrict its competitors. As this Court also concluded in *Noerr*, "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." 365 U.S. at 139.

In this case, defendants "enforced" the Users' Agreement by appearing and opposing respondent's petition to the San Diego Port District. The Port District was both a party to the Users' Agreement and the government agency authorized to determine whether to waive or enforce its terms. When Arthur Engel petitioned the Port District in 1977 to waive the experience and financial requirements of the Users' Agreement as to respondent alone, petitioner appeared before the Port District's Board of Commissioners to express its view that such requirements were reasonable and necessary. At the Port District's behest, the Port District staff then conducted a study and reported that such experience and financial requirements should be upheld as to all and that no special waivers were justified. Based upon its staff's recommendation, the Port District denied respondent's application for a waiver of those requirements.

Thus respondent petitioned the Port District to grant a waiver, Triple "A" and others opposed respondent's petition, and respondent lost. Just as respondents' appear-

ance before the Port District was protected activity under the First Amendment, so was petitioner's appearance in opposition to respondent's application. Indeed, the action of which respondent complains—the denial of a special waiver for its sole benefit—was not even taken by petitioner but by the Port District in its official capacity.

Following trial of this action below, the Ninth Circuit ruled in a strikingly analogous case entitled *In Re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982), *aff'g*, 521 F.Supp. 568 (N.D.Cal. 1981), that defendants' concerted efforts to induce municipal airport authorities throughout the United States to grant them exclusive contracts to operate car rental concessions and to exclude plaintiffs from those airport markets was lawful under *Noerr-Pennington*. The district court in *Airport Car Rental* found, and the Ninth Circuit agreed, that defendants' petitioning conduct was not "merely exempt" but that the Sherman Act—as construed by this Court—simply does not prohibit joint efforts to induce governmental action, 521 F.Supp. at 575; 693 F.2d at 87-88. Rejecting plaintiffs' argument for a "commercial activity" exception to *Noerr-Pennington*, the court in *Airport Car Rental* reiterated this Court's pronouncement as to the purpose and breadth of the *Noerr-Pennington* doctrine:

"Activities intended to influence public officials in making commercial decisions are entitled to protection not merely as proposals of a commercial transaction. Regardless of any collusion or purpose to gain a commercial advantage over competitors, they are a vehicle for communicating information to public officials. As the Supreme Court said in *Noerr*, it is people seeking

official action to 'bring about an advantage to themselves and a disadvantage to their competitors . . . who provide much of the information upon which governments must act.' 365 U.S. at 139, 81 S.Ct. at 530. Commercial speech therefore enjoys First Amendment protection not only as an exercise of the right to speak and petition but also to guard the reciprocal right of the public, through its officials and agencies at all levels of government, to receive information." 521 F.Supp. at 581.

Defendants' petition for writ of certiorari already raises an important and substantial issue for review: whether truly complete involvement and participation in an anti-trust conspiracy by respondent's alter ego should bar respondent's antitrust cause of action. As this Court has not addressed the *in pari delicto* doctrine for sixteen years (since *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968)) and has never faced the issue at hand, certiorari should be granted to clarify the scope of this important antitrust doctrine.

But that is not the only reason why certiorari should be granted here. Respondent's brief in opposition raises a separate and no less significant issue: If defendants' joint enforcement of the Users' Agreement before the Port District must be considered in deciding whether respondent was *in pari delicto* under *Perma Life*, as respondent insists, may that same conduct be the basis for holding that petitioner violated the antitrust laws in light of *Noerr-Pennington* as construed by the Ninth Circuit in *Airport Car Rental*? Because *Noerr-Pennington*

addresses whether conduct is prohibited by the antitrust laws in the first place, while *in pari delicto* merely allocates fault once an antitrust violation is found, this Court's answer should be as clear as it is significant.²

Respectfully submitted,

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²At a minimum, petitioner requests the Court to remand this action to the district court with directions to reconsider its finding of antitrust liability in light of the *Noerr-Pennington* doctrine as construed by the Ninth Circuit in *Airport Car Rental*.

